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IN THE

Supreme Court of the United States

October Term, 1961

No. 635

ABRAHAM KABOT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

ABRAHAM KABOT,

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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Abraham Kabot, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on November 13, 1961.

Citations to Opinions Below

The opinion of the Court of Appeals, printed in the Appendix hereto, *infra*, pp. 1a-15a, is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on November 13, 1961 (Appendix, *infra*, pp. 16a-17a). A petition for rehearing filed November 27, 1961, in the Court of Appeals was entertained by that Court and was denied by

it on the merits on November 28, 1961 (Appendix, *infra*, p. 20a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

At petitioner's trial for bribery, the copious proofs of attempted extortion and enticement to crime were wiped out of the case by the trial court's instruction to the jury to ignore any issue of entrapment. The sole ground of this instruction was that a defendant who completely denies guilt is "estopped" from pleading the "inconsistent" defense of entrapment. The trial court declined to follow the only federal authorities which have actually examined into the supposed "rule" against such "inconsistent" defenses—see separate opinion of Justices Brandeis and Butler in *Casey* v. *United States*, 276 U. S. 413, 424 (the majority Justices not reaching the issue), and *Henderson* v. *United States*, 237 F. 2d 169 (C.A. 5, 1956). The Court of Appeals, affirming the conviction, refrained from endorsing the trial court's "rule" against "inconsistent" defenses, holding it unnecessary to reach this issue because as a matter of law proven extortion attempts which have concededly preceded any alleged bribe offer by the intended extortion victim are not evidence of entrapment for submission to the jury and would be "insufficient to base any inference of government effort to incite Kabot [petitioner] to crime." The questions are:

1. Did the Court of Appeals err when it expressly held that entrapment of a citizen can only be committed by "overzealous Government agents" but that "dishonest Government agents" who were seeking to extort could not entrap?

2. Is it not a violation of due process for the Government after investing a person with the cloak of federal authority and after that person abuses such authority by attempting a corrupt imposition on a citizen, for the Government to wash its hands of the acts of the corrupt officer yet at the same time, when it prosecutes the citizen for succumbing to the imposition, to seek to defeat the defense of entrapment by divorcing itself from the responsibility of its corrupt officer for originally implanting the evil design?

3. Did the Court of Appeals err in rulings whose necessary corollary is that even though prior extortion attempts were proved, nevertheless jury issues were not presented either (a) as to whether the antecedent extortion attempts constituted the original implanting of the evil design by the government's officers, and (b) as to whether an alleged subsequent bribe offer by the intended extortion victim was derivative from the prior extortion attempts?

4. Is it error for the trial court to instruct a jury that no issue of entrapment exists in a case where the Court of Appeals has said that the uncontradicted evidence supports an inference of attempted extortion by Government officers prior to any claimed suggestion of a bribe by the defendant —the sole ground for the trial court's refusal to instruct on entrapment having been the supposed "rule" that a disclaimer of guilt by the defendant bars "the inconsistent" defense of entrapment.

5. May a trial court, on the sole basis of a supposed "rule" against "inconsistent" defenses, refuse to let a jury consider the central theory of the defense? Is not a defendant in a criminal trial absolutely entitled to have his evidence-supported theory of defense submitted to the jury?

6. Beyond the taint of ordinary entrapment, do the investigative features of this case reveal unconstitutional prosecutive taint in such extraordinary degree as to require this Court to intercede in order to protect the purity of federal criminal justice; and was this unconstitutional taint further intensified by the fact that the electronic eavesdropping was entrusted by the Government to be carried out by the very agent (Keyser) who the defendant claimed was one of the moving parties in an antecedent extortion attempt or bribe solicitation.

7. Was the unconstitutional taint further intensified by the Government's tactical election to make its case against the defendant at the trial without calling as a witness Keyser's alleged extortion-accomplice, Agent Gillis, when Gillis was in the Government's employ this entire time as a person whom the Government itself suspected of guilty conduct in this case, and when the Government has since admitted (but not until after the trial) that Gillis did in fact have "an apparent participation in this sordid affair"?

8. Was the electronic eavesdrop evidence (*per* concealed minifons and microphones) inadmissible as the product of a search and seizure which was unconstitutional in the overall circumstances of the case, and especially so within the meaning of the suggestion in *On Lee* v. *United States*, 343 U.S. 747 at 754, that eavesdrop evidence may be excludable where "an agent • • • violated any federal law", the evidence herein having been obtained by a Government officer (Keyser) who the defense alleged had just attempted in this very same matter to commit extortion—a violation of 18 U.S.C. § 872 and to solicit a bribe—a violation of 18 U.S.C. § 202.

9. Where the electronic eavesdrops of conversations between Agent Keyser and the petitioner (all subsequent to Keyser's switch from extortion to entrapment) were admitted in evidence despite their profound unreliability, and where the single government recording of a conversation between Agents Keyser and Gillis was unexplainedly excluded from evidence, was petitioner denied a fair trial by reason of the exclusion of proof relevant to the extortion-entrapment defense?

10. Where electronic eavesdrop proofs permeated the case, where by the trial court's own pronouncement the recordings were pervasively inaudible, where their reliability was further impugned by evidence that Agent Keyser could have tampered with them, and where stenographic transcripts of the recordings which were excluded by the trial court were nevertheless continually permitted to be referred to by the Government in such manner as to suggest to the jury that the transcripts were accurate and that the recordings must be audible to permit of their being thus accurately transcribed, was petitioner convicted on evidence which was not only unconstitutional but was also probatively incompetent?

11. Was the petitioner's right to have his theory of defense submitted to the jury violated also by the instruction forbidding the jury to consider the evidence which had been admitted concerning petitioner's dealings with Agent Keyser on the merits of the tax issues? Was petitioner thereby denied a jury trial of the issue of his incentive and intent to bribe?

12. Where the issue of credibility was crucial, and the extremely impressive array of distinguished character witnesses could have lent decisive support to the credibility of petitioner, was petitioner denied a fair trial by a charge on character which destroyed the effect of the character testimony by gratuitously telling the jury, without a shred of supporting evidence, that petitioner might have misled his witnesses and not revealed to them his true character?

Constitutional Provisions and Statutes Involved

The case involves the Fourth Amendment of the United States Constitution; 18 U.S.C. §201, the statute under which petitioner was convicted; and the statutes relating to extortion (18 U.S.C. §872) and solicitation of bribes (18 U.S.C. §202) by federal officers. The text of these provisions is printed in the Appendix, *infra*, pp. 18a-19a.

Statement of the Case

Petitioner was convicted in the District Court, after a jury trial on one count of offering and one count of giving a bribe to a federal Internal revenue Agent in violation of 18 U.S.C. §201, and he was sentenced to eighteen months on each count (to run concurrently) (indictment, D1a[1]; judgment, D627a). Petitioner appealed to the Court of Appeals from the judgment of conviction (D629a). The judgment of the Court of Appeals here sought to be reviewed affirmed the conviction (Appendix, *infra*, pp. 16a-17a). Petitioner is free on bail granted by the Court of Appeals pending the proceedings in this Court.

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[1] "D a" refers to the "Appellant's Appendix" (printed) in the court below, nine copies of which are filed herewith.

Petitioner is a certified public accountant of unblemished prior record in his thirty years of practice (D428a-431a, D464a-468a, D478a-495a, D 568a). His alleged bribery of Keyser was in connection with a client's tax matter (D35a-37a). Petitioner, testifying, denied all participation in the alleged offense.

The defense proved, *uncontradictedly*, that another Agent, Gillis, representing himself as Keyser's emissary, initiated veiled extortion efforts; and that for weeks Agents Gillis and Keyser continued these subtle pressures. Thus:

On September 8, 1958, at Keyser's initial meeting with petitioner and his accounting-firm partners, he almost immediately "dropped" the name of Maurice Gillis as someone he knew in New York (D45a, D92a, D234a-235a, D434a, D453a-454a, D499a). Although petitioner and his partners indicated that Gillis' name had no particular meaning for them, Keyser harked back to Gillis' name again later on that first day (D434a, D499a), saying he might try to get Gillis assigned to assist him on the Van Berg case (D434a, D454a). On the following day (September 9, 1958), Keyser sought out Gillis in the latter's New York headquarters before commencing the Van Berg audit in earnest (D91a-93a). Keyser's trial version that he first mentioned Gillis to petitioner on September 8, 1958, and of his having done so *before* looking up Gillis the next day (D45a, D91a-93a, D234a-235a), was aimed to allay the suspicion raised by his Grand Jury testimony (D376a-384a), that Keyser had moved promptly after receiving the Van Berg assignment (or *opportunity*) in July 1958 to set up something sinister in complicity with Gillis long before meeting the accountant or the principals in the case.

Wholly uncontradicted is the following: Later on the same day when Keyser first (according to his trial version) sought out Gillis at the latter's office (September 9, 1958), or within a few days thereafter, Gillis appeared, unbidden, at the petitioner's office (D435a, D507a-508a). Gillis spoke of his long friendship with Keyser, that Keyser wanted to know what kind of accounting firm they were, whether they had large or small clients, whether they knew their business, and that Keyser wanted him (Gillis) to "let you know that he is a very rough and tough Agent and he is going to do his best to see that your client knows about it" (D435a, D437a-439a, D507a-510a). Gillis, the only person in a position to deny his above-described remarkable conversation with petitioner, remained unheard from at the trial, as the Government chose not to use him as a witness even though he continued in its employ (D85a, D289a).

Next, also uncontradictedly, on October 9, 1958, Keyser demanded a personal interview with the elder Mr. Van Berg, for the sole purpose of a gratuitous face-to-face announcement that he (Keyser) was going to recommend a prodigious tax deficiency, exceeding $2,000,000 (D40a-41a, D120a-121a, D195a-204a, D514a-515a). Keyser concealed the uncontradicted facts of this intimidatory interview from his superiors (Exh. 18, D120a-121a, D198a-204a).

It is also uncontradicted that on the night of the day of the above Van Berg interview, Keyser and Gillis got together for the evening (D93a, D97a, D123a-127a (Exh. A read to jury), D201a, D384a-385a, D515a-517a), discussed the Van Berg tax case, and Gillis discoursed upon tax bribery practices (Exh. A, Govt.'s Appendix, Ct. App., p. 255a).

On October 27, when Keyser again came to petitioner's office to discuss the tax case, he telephoned Gillis (D390a, D523a-524a) and arranged a lunch date for Gillis, Keyser and petitioner. They did meet for lunch that very day. During the phoning, Keyser, while in petitioner's office, had inquired with special curiosity about the lights flashing on and off on a telephone dictating instrument on a window ledge behind petitioner's desk (D163a-165a, D440a-443a, D519a-523a). The defense contended that this dictating instrument caused Keyser to fear that his words were being recorded by the petitioner, and that this caused Keyser to decide falsely to accuse petitioner (D103a-104a, D163a-165a).[2]

After lunch on October 27 Gillis left and Keyser and petitioner stopped briefly at the taxpayer's office. They then strolled down Fifth Avenue and had a conversation of whose import Keyser claimed he was not certain at the trial D43a-44a, D89a-90a, D393a-394a, D530a-531a).

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[2] Keyser claimed that he became suspicious of the telephone dictating machine on November 13, not October 27 (D163a-165a). He was just as mistaken on this subject as he was when he said that the lunch date was not October 27; his Grand Jury testimony proved him wrong (D388a-392a). Keyser's continual resort to evasions, ambiguities and failures of memory regarding key dates in his dealings with Gillis, as shown in the matter of the above mentioned luncheon of October 27, was instanced also in his testimony about the date of the dinner at Gillis' home on October 9, right after Keyser's previously described intimidation of the elder Mr. Van Berg (D93a, D97a, D201a). Keyser even contended at one point (without realizing his imprudence in pushing so far his strategy of non-recollection) that the Gillis dinner could have been as late as October 27 or 28, 1958 (D201a), which would have put him and Gillis together for *both* lunch and dinner on the day of the very night when Keyser claimed he sat alone pondering whether to falsely report the petitioner for offering a bribe (October 27—*infra*), or on the first night of the bribery investigation (October 28—*infra*), when the Treasury Detectives would certainly have been most interested in surveillance of any such Keyeser-Gillis rendezvous.

After a night of alleged uncertainty, the alleged equivocal conversation was reported the next morning, October 28, by Keyser and then he was instructed by Internal Revenue Inspectors Kiely and Sweeney (D46a), that "if a bribe was offered, I was to fall in line with it", "pick it up and go along with it" (D134a), "purposely * * * lie to him" (D135a) in proffering "phony" tax recommendations. See also D134a-137a, D156a-159a, D241a-242a, D330a-337a. The Inspectors on October 28 also put a miniphone electronic recording device on Keyser (D47a, D267a-269a), who then went to petitioner's office where, he testified, petitioner offered him a $25,000 bribe (D48a-57a). There is no audible electronic-record corroboration of such $25,000 bribe offer (Appendix, *infra*, p. 5a). Keyser's testimony included numerous admissions of how then and later it was he who carried the evil design to petitioner, not vice versa (D135a-136a, D149a, D151a-152a, D178a, D218a-219a). Under continuous direction by the Treasury Inspectors Keyser carried forward the entrapping operation, all electronically eavesdropped (but abortively recorded—see further as to this below), until November 19, 1958 (D62a-66a, D70a-74a, D168a-169a, D171a, D185a-186a, D188a-189a, D191a-194a, D218a-222a, D241a-242a, D247a-248a, D271a-276a, D311a-312a, D335a-340a, D343a-347a, D365a-366a). For the defense testimony denying any improprieties by petitioner see D460a-462a, D530a-536a, D538a-539a, D543a, D547a-551a, D556a-557a, D559a-560a, D562a, D565a-566a.

The entrapment culminated on November 19, 1958 in a staged arrest of Keyser and of petitioner while Keyser was carrying $25,000 in cash which he said he had got from petitioner, and which the defense denied, contending that this money could perfectly well have been obtained by Keyser

from someone else in view of the long-prior manifestations that the Gillis-Keyser team was out to get money from some victim in this tax case (D409a-410a, D421a-422a, D550a-551a, D556a-557a, D559a-560a, D562a, D565a-566a).

Our above chronological recitals passed over an important incident of October 29 or 30, 1958, when Keyser was sent by the Inspectors to hold a miniphone recorded conversation in private with Gillis (D97a-99a, D131a). The Government's testimony showed that Keyser could have purposely spoiled this potentially intriguing recording (D329a, D347a-349a). The court denied defense requests to have it played for the jury (D399a, D416a-417a). Keyser's testimony of what he and Gillis talked about was that Gillis once again, as he had done during their dinner evening earlier in October, spoke impliedly in a general way about C.P.A.'s or attorneys trying to bribe income tax agents (see Exh. [illegible], D123a-217a; and D97a-99a, D128a-129a, D399a-401a).

The trial court ruling that a defendant may not raise the "inconsistent" defenses of entrapment and denial of wrongdoing, forbade the jury to consider the extortion-entrapment defense (D579a, D587a, D592a, D593a, D595a), which was the central theory of the defense (D87a-89a, D132a-134a, D148a, D245a-246a, D297a-298a, D310a, D422a-427a, D536a-537a, D577a-582a, D586a-586a, D603a-605a, D621a-625a).

Likewise excluded from the jury's consideration was the voluminous testimony (cited at p. 27, *infra*) which had been admitted in evidence pertaining to consultations between Keyser and petitioner on the merits of the client's tax matter. This evidence bore directly upon the question of petitioner's intent to bribe.

The Court of Appeals, in affirming the conviction, held *inter alia* that it was unnecessary to reach the question of the right to plead "inconsistent" defenses because, granting that the Keyser-Gillis extortion efforts were proved,[3] there was insufficient evidence of entrapment for the jury since such extortion would constitute the private venture of Agents Keyser and Gillis rather than governmental effort to incite petitioner to crime (Appendix, *infra*, p. 12a).

In another place in the opinion (Appendix, *infra*, p. 13a) the Court of Appeals cited, as the seemingly controlling authority to sustain the non-submission to the jury of the entrapment issue, a case which was decided solely on the basis of the purported "rule" against such inconsistent defenses in entrapment cases.[4]

Reasons for Granting the Writ

(Questions Presented, 1-2-3-4-5)

1. In holding that an extortion attempt made by a Government officer antecedent to any alleged bribe suggestion from the intended victim of the extortion is, as a matter of law, not a defense to that victim when he is accused of bribing that same officer in the same matter, the court below has erroneously decided an important question of the federal law of entrapment which has not been but should be decided by this Court. Persons reading the opinion below

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[3] In its brief in the Court of Appeals (p. 41) the Government conceded that Gillis had an "apparent participation in this sordid affair".

[4] "* * * * Lacking sufficient evidence of entrapment, denial of the requested instruction was not error. United States v. Di Donna, 276 F. 2d 956 (2 Cir. 1960)." (Appendix, *infra*, p. 13a.)

will learn to their astonishment that the considerations of governmental morality and decency which dictate the federal anti-entrapment policy are less availing to protect citizens against the venal than against the over conscientious official provocateur. Such a judicial opinion by a United States Court of Appeals should not lightly be permitted to remain unrepudiated in the published reports.

If it is sought to be made part of the federal law of entrapment that the Government may wash its hands of responsibility for luring a citizen into alleged crime when the implanting of the evil design is done by a corrupt official rather than by a zealous one, the determination of whether to establish with finality this novel doctrine should be made by this Court, upon a plenary consideration of the grave questions of public morality which such a proposed doctrine would disturbingly compromise.

The court below, the first and solitary one among this country's courts to espouse this momentous new doctrine, has manifestly not considered or appreciated rightly its pronouncement that a citizen may first be intimidatingly softened for extortion by Government officials, may next be treacherously cozened for entrapment when the official extortionists lose their nerve, and may then be sentenced to imprisonment without having had even so much as an opportunity to tell a jury that this is the way the Government has made its "case" against him. Our reason for saying that the court below has acted without a real appreciation of its own doctrinal thrust in this case—and that therefore the fullest review processes of this Court are all the more needed—is that the opinion below shows no recognition of the inescapable logical consequence that, once it is conceded

(as is done by the court below) that the trial proofs allow the factual inference of an antecedent extortion attempt, the original implanting of the evil design has *ipso facto* been effected and the cardinal test of entrapment has *ipso facto* been met ("* * * when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offence * * *". *Sorrels* v. *United States*, 287 U. S. 435, 432; *Sherman* v. *United States*, 356 U. S. 369, 372).

The moral odiousness of the new doctrine's impact in this particular case is of a special enormity. The opinion below in effect hypothesizes that it would be reconcilable with the ethics of federal criminal justice for an official extortionist not only to be indulged in making a pull-back from his own criminal venture with impunity, but that further, precisely and only by virtue of his governmental position, he is to be enabled to reinsure his impunity by concocting a case against his intended extortion victim and to secure the success of the frameup with the aid of all the official paraphernalia of federal criminal law enforcement. The pattern of evil which this holds forth is almost too affrighting to be real; but there it stands written, albeit inadvertently, on the pages of the opinion below, plain for future official malefactors to discern and to follow.

The conclusion of the court below that any Gillis-Keyser extortion plot was no defense to the petitioner is unsound for the following additional reasons: The court did not take into consideration the provisions of 18 U.S.C. §872, which deals with extortion by officers or employees of the United States, and of 18 U.S.C. §202, which deals with

solicitation of bribes by such officers or employees. Those statutes illustrate the intrinsic truth that the realistic effect of an attempt by a Government officer to extort is to seek a bribe. In any such extortion-bribery case where the evidence presents the issue, would it not necessarily be for the jury to determine whether the individual dealing with the Government agents succumbed to extortion or offered a bribe? See, e.g., *State* v. *Browning*, 133 N. W. 330, 336, 153 Iowa 37:

> "* * * if an officer whose duty it is to make an arrest suggests that for a price he will not make an arrest, the offense is not the making of malicious threats to extort money, but an offer to accept a bribe * * *".

Thus, the opinion below has simply misconceived the meaning of the word extortion for the purposes of the entrapment issue in this case. Extortion is not only, as the court below phrased it, "conduct by dishonest employees attempting action against the Government" (Appendix, *infra*, 12a). Extortion is also (we paraphrase) "conduct by dishonest employees attempting action against" any citizen or taxpayer.

The court below, in short, has taken for naught everything that happened between petitioner and the Gillis-Keyser extortion team prior to October 27-28, 1958. While acknowledging the inferrability of the prior extortion efforts, the court below refrained from drawing the seemingly inescapable conclusion that the real origin of the bribe idea—the implanting of the evil design, hence the origin of the claimed entrapment—should be sought in those earlier extortion happenings.

However, the conjoined rulings of the Court of Appeals and the trial court in this case strike an even deeper blow against the rationality and the fairness of federal criminal justice than is expressible solely in terms of the treatment of the entrapment doctrine. For, more fundamentally what has happened here is that the (one had thought) elementary right of a defendant in a criminal prosecution to have a proper jury instruction presenting *his theory of the case*, has been swept away as a sacrifice to technicalisms and to the policy of short-shrift conviction procedures which is becoming all too prevalent in the federal courts in recent years.

It is fundamental that a defendant in a criminal prosecution is entitled to a proper jury instruction presenting his theory of the case. *Calderon* v. *United States*, 279 Fed. 556, 558 (C.C.A. 5, 1922):

> "Where the evidence presents a theory of defense, and the court's attention is particularly directed to it, it is reversible error for the court to refuse to make any charge on such theory. Bird v. United States, 180 U. S. 356, 361, 21 Sup. Ct. 403, 45 L. Ed. 570; Hendrey v. United States, 233 Fed. 5, 18, 147 C.C.A. 75; Liner v. State, 124 Ala. 1, 7, 27 South, 438; Banks v. State, 89 Ga. 75, 14 S.E. 927. * * *"

See also *Levine* v. *United States*, 261 F. 2d 747 (C.A.D.C. 1958) (collecting the authorities).

The trial court admitted into evidence the proofs of the antecedent extortion attempts, and then, without making any unfavorable finding or disparagement of any kind concerning the weight or credibility of those proofs (the Government's motion to strike them was denied—D578a-581a),

the trial court obliterated this entire defense theory from the case solely on the strength of the conceptualistic so-called "rule" against the "inconsistent" defenses of entrapment and complete disclaimer of guilt by a defendant (critique of this "rule" appears *infra*).

Such was the trial court's contribution to the law of this case. What of the Court of Appeals? That Court, while in one breath saying that the question of the validity of this latter "rule" need not be reached, and in another breath seemingly adopting that very "rule" (*per* its citation of the *Di Donna* case as the controlling authority herein—see footnote 4, *supra*), went on to lay down the previously noted novel gloss on the federal law of entrapment which is embodied in the ruling that an attempt by official governmental extortionists to solicit a bribe is not relevant to the issue of alleged intent by the chosen extortion victim ultimately to offer the bribe which had been thus extortionately solicited in the first instance and before the victim had manifested any disposition to do so.

The supposed "rule" against "inconsistent" defenses in entrapment situations is found, upon critical study of the pertinent cases, to be chimerical. The only federal cases which have really come to grips at all with the question of the existence or the soundness of this "rule" have spoken against it.

In the single case we have found in which this Court has had occasion to deal explicitly with the question of the right to plead inconsistent defenses in an entrapment situation, the only two Justices who spoke on the point (Justices Brandeis and Butler, in a separate opinion) not only were not troubled by the problem of the inconsistency of defenses,

but favored allowing the inconsistent defenses to be raised for the first time by the Court itself, *sua sponte*. *Casey* v. *United States*, 276 U. S. 413, 424 (1928). The majority Justices (the decision was 5 to 4) did not reach the issue (276 U. S. at 418-419).

The right of a criminal defendant to plead inconsistent defenses is traditional. E.g., *State* v. *Baker*, 277 S.W. 2d 627 (S. Ct. Mo. 1955) (murder—self-defense and accident); *Yarbrough* v. *State*, 162 Pac. 678 (Okl. Cr. App. 1917) (manslaughter—self-defense, accident and insanity); *State* v. *Cameron*, 158 N.W. 563 (S. Ct. Iowa 1916) (seduction—denial of intercourse by accused and evidence of prosecutrix's previous unchaste character in conduct with accused); and see the extensive discussion in *Henderson* v. *United States*, 237 F. 2d 169, 172-173 (C.A. 5, 1956).

The *Henderson* decision just cited, indeed, considered the right to plead inconsistent defenses in specific reference to the issue at bar, viz., defenses of entrapment and denial of commission or participation in the offense. *Henderson* (a liquor law prosecution) involved substantive and conspiracy counts. The defendant denied the conspiracy charge but not, apparently, the substantive charge. It was held error to deny his requested charge on entrapment under the conspiracy charge. The court doctrinally supported its ruling in favor of permitting the inconsistent defenses by citing authorities which look to an expansive administration of the rule against entrapment in the interest of furthering the important principles of social morality which that rule was designed to serve.

The frequently stated "general rule" that the defense of entrapment is inconsistent with the defense of denial of

commission of the offense charged is simply not borne out by the authorities. In addition to the *Casey* and *Henderson* cases, *supra*, see the following federal cases (numbered by us consecutively for convenience of summarization) in all of which (a) an entrapment issue on appeal was actually entertained or its entertainment in the trial court was not disapproved, and (b) the "inconsistent" defense of denial of commission of the offense was presented on the record either by direct denial (cases #1, 4, 5, 7, 8, 10, 11, 12, 13, 15, 19, 20, 21), challenge to the sufficiency of the Government's evidence (cases #3, 18), repudiation of a confession (case #9), impugnment of the credibility of the Government's witness (case #6), or the declination of the defendant to take the stand (cases #2, 14, 16, 17): [1] *Driskill* v. *United States*, 24 F. 2d 525 (C.C.A. 9, 1928); [2] *Cratty* v. *United States*, 163 F. 2d 844 (App. D.C. 1947); [3] *Ryles* v. *United States*, 172 F. 2d 72 (C.A. 10, 1948), vacated on other grounds, 336 U. S. 949 (1949), conviction on retrial affirmed 183 F. 2d 944 (1950); [4] *Malatkofski* v. *United States*, 179 F. 2d 905 (C.A. 1, 1950); [5] *Singer* v. *United States*, 208 F. 2d 477 (C.A. 6, 1953); [6] *Henry* v. *United States*, 215 F. 2d 639 (C.A. 9, 1954); [7] *Cohen* v. *United States*, 201 F. 2d 386 (C.A. 9, 1953), certiorari denied 345 U. S. 951; [8] *Bush* v. *United States*, 218 F. 2d 223 (C.A. 10, 1954); [9] *United States* v. *White*, 223 F. 2d 674 (C.A. 2, 1955), certiorari denied 350 U. S. 888; [10] *United States* v. *Valdes*, 229 F. 2d 145 (C.A. 2, 1956), certiorari denied 350 U. S. 996; [11] *Accardi* v. *United States*, 257 F. 2d 168 (C.A. 5, 1958), certiorari denied 358 U. S. 883, 900, rehearing denied 358 U. S. 938; [12] *Crisp* v. *United States*, 262 F. 2d 68 (C.A. 4, 1958); [13] *Stein* v. *United States*, 263 F. 2d 579 (C.A. 9, 1959); [14] *Marshall* v. *United States*,

258 F. 2d 94 (C.A. 10, 1958), reversed on other grounds, 360 U. S. 310 (1959); [15] *Lathem* v. *United States*, 259 F. 2d 393 (C.A. 5, 1958); [16] *Bruno* v. *United States*, 259 F. 2d 8 (C.A. 9, 1958); [17] *United States* v. *Place*, 263 F. 2d 627 (C.A. 2, 1959), certiorari denied 360 U. S. 920; [18] *United States* v. *Phillips*, 270 F. 2d 175 (C.A. 2, 1959); [19] *Chapman* v. *United States*, 271 F. 2d 593 (C.A. 5, 1959), certiorari denied 362 U. S. 928; [20] *Cellino* v. *United States*, 276 F. 2d 941 (C.A. 9, 1960); [21] *Moreland* v. *United States*, 282 F. 2d 343 (C.A. 9, 1960).

Examples of state cases allowing a defendant to plead entrapment when he denies commission of the offense are, e.g.: *People* v. *West*, 293 P. 2d 166, 168 (Cal. App. 1956); *State* v. *Decker*, 321 Mo. 1163, 14 S.W. 2d 617 (1929); *State* v. *Snider*, 111 Mont. 310, 111 P. 2d 1047 (1940); *Wooten* v. *State*, 106 P. 2d 132 (Okl. Cr. App. 1940); *Beasly* v. *State*, 282 P. 2d 249 (Okl. Cr. App. 1955); *Koscak* v. *State*, 152 N.W. 181 (S. Ct. Wisc. 1915).

In the face of the above authorities, scant basis remains for treating with confidence the assertions of writers such as the author of the Annotation in 61 A.L.R. 2d 678 (*"Availability of Defense of Entrapment Where Accused Denies Participating At All In Offense"*) to the effect that the weight of authority holds "that the defense of entrapment is not available to the defendant who denies that he committed the offense charged". It is our observation rather, based on the research done for this proceeding, that any such supposed "rule" is honored mainly in the breach. The *Casey* and *Henderson* cases, *supra*, indeed appear to be the only federal authorities which *examine* the supposed "rule" as presenting problems for analytical consideration, rather

than merely mouthing the rule or perfunctorily applying it without discussion, as seems to be the conventional practice in the decisions which do invoke the "rule". Space limitations forbid our presenting a detailed critique of the decisions of the latter class with a view to showing that in literally every single one of them the supposed "rule" is applied without any discussion whatsoever of its doctrinal foundations, or is thus applied in company with an appellate finding that the defendant did not effectively preserve his rights in the trial court. This is true not only of each of the decisions cited in the last mentioned A.L.R. Annotation (61 A.L.R. 2d 677 *et seq.*), but also in the other decisions we have found which are of similar purport, viz., *United States* v. *DiDonna*, 276 F. 2d 956 (C.A. 2, 1960) ("rule" applied without discussion); *Johnson* v. *United States*, 273 F. 2d 33 (C.A. 5, 1959), certiorari denied 362 U. S. 951 (point not preserved for appeal); *United States* v. *Blount*, 229 F. 2d 669 (C.A. 2, 1956) (*dictum, semble*, p. 671, fn. 2); *Nutter* v. *United States*, 289 Fed. 484 (C.C.A. 4, 1923) ("rule" applied without discussion).

The conflict between the federal Circuit decisions applying the "rule" and the *Henderson* and other cases cited *supra*, should be resolved by this Court.

(Questions Presented, 6-7)

2. By its belated admission (in the Court of Appeals) that one of its own officers (Gillis) had "an apparent participation in this sordid affair", the Government has necessarily acknowledged a taint in its case against petitioner. Gillis' improper conduct plainly called for scrutiny of Keyser's conduct as well, to assure that petitioner not be jeopardized in a prosecution that was unconstitutionally

tainted by the acts of the Agents. Even more, petitioner should have been protected against the Government's election to pitch its case upon the tactic of deliberate suppression of the important information at its command relating to these issues—the testimony of the absent witness Gillis, his Grand Jury testimony, and the Keyser-Gillis recordings.

These compelling indications of unconstitutional taint in in this case have thus far been kept absolutely screened from judicial consideration on the merits—the trial court having ultimately screened the uncontradicted proofs of taint both from itself and from the jury by the "inconsistent defenses" ruling, and the Court of Appeals having done so by its bewildering doctrinal innovation that antecedent attempted extortion bears no relation to the implanting of an original design to bribe. The purity of federal criminal justice and due process were violated, nay outraged, when this prosecution was allowed to commence in the face of the Gillis-Keyser attempted extortion background which was known to the Government; the outrage passed beyond any conceivably justifiable bounds of decent prosecutive zeal when the Government insisted (successfully) that the jury not even be permitted to consider the extortion-entrapment proofs. This is, we submit, suppression of exculpatory evidence in violation of the due process clause, within the meaning of *Napue* v. *Illinois*, 360 U. S. 264, 269-270. See *Note, The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 Col. L. Rev. 858 (1960).

(Questions Presented, 8-9-10)

3. All of the eavesdrops were by concealed miniphone on Keyser's person, except one on November 13, 1958 by a concealed microphone eavesdropping Keyser's hotel room

from the adjoining room secretly occupied by the Treasury Detectives, petitioner having been lured to the hotel for this purpose (D47a, D66a, D70a-71a, D97a-99a, D131a, D168a-169a, D185a-186a, D188a-189a, D193a, D259a-281a, D287a-289a, D311a-312a, D338a-340a). The recordings were introduced purportedly to corroborate the alleged bribe offer of October 28, 1958, and allegedly suspicious-sounding remarks in subsequent conversations. However, the trial court in its charge to the jury said "my own opinion is that to a very large extent they are inaudible" (D597a). The Court of Appeals stated that the alleged words of the alleged bribe offer (that petitioner thought he could "get around 25 grand")—Keyser's version—were inaudible (Appendix, *infra*, p. 5a); the Court of Appeals also noted the inaudibility, or disputed audibility, or complete spoilage of all of the other recordings of conversations between Keyser and petitioner (Appendix, *infra*, pp. 5a-7a). The most interesting "spoilages"—the miniphone "failed" to work, or the wire "broke" in processing—were on November 13, when Keyser returned with his first batch of "phony" tax reports, and on November 19, when another witness (Petitioner's partner Gideon) was present to contradict Keyser (D269a-271a—Exhs. 47, 47A; D280a-281a—Exhs. 20, 53, 53-A; D460a-462a, D537a). The jury "heard" (D301a-305a) all of this electronic gibberish, except, significantly, the Keyser-Gillis recording of October 29, or 30, 1958 which allegedly contained the compromising bribery discussion earlier noted, the recording which the defense wanted the jury to hear and which the trial court unexplainedly did not permit (D399a, D416a-417a). The Government's testimony, as noted, showed that Keyser could have purposely spoiled this all-important recording. The

Court of Appeals listened to the Keyser-Gillis recording and described its audible parts, which contained intriguing hints that the two Agents were talking in the guarded manner of persons who were up to no good (Appendix, *infra*, p. 10a).

Although the purported stenographic transcripts of the recordings were excluded (D296a-297a, D376a, D597a), these transcripts were nevertheless permitted to be continually referred to by the Government and its witnesses (*e.g.*, D81a, D84a, D150a, D153a, D239a, D245a, D268a, D27a, D276a, D280a-281a, D288a-289a, D322a-323a, D370a-376a) in such manner as to suggest to the jury that they were accurate and that the recordings must be audible to permit of their being thus accurately transcribed. The theme of supposed accuracy and authority of the transcripts was drummed (*e.g.*, D69a-70a, D274a-275a, D370a-376a).

The reception in "evidence" of these worthless "recordings", tendentiously "corroborated" by the wholly improper use of the "accurate transcripts", affords a distinct and important ground for review by this Court. Would the courts of this country tolerate, in the proffering of any other form of evidence, for example, in documentary evidence, such physical imperfections, such pervasive lacunae, such fragmentation and shredding and all-around spoilage of the "text", such clumsy mutilation, such net undecipherability? Would our courts tolerate, in any documentary proof, or in any human witness' memory on the stand, this patchy, disintegrated sort of probativeness? What is there about electronic eavesdropping that should endow it, above all other modes of proof, with such unique immunity from the traditional rules of Anglo-American judicial proof?

'lectronic eavesdropping, because of its offensiveness to the civilized decencies of a free society, and not less because of its susceptibility to selective "spoilage" as is so dramatically instanced in this case—why is it that one never seems to get audible police recordings which are exculpatory of a defendant—ought to be treated, under the tests of probativeness, as the lowest, not the highest quality of proof is treated.

As to the unconstitutionality of the eavesdrop proofs, we urge that in the overall circumstances of the case—the attempted extortion-entrapment pattern, the suppression of exculpatory evidence, and the entrusting of Keyser himself with the eavesdrop operation—those proofs were obtained by illegal search and seizure, especially so within the meaning of the suggestion in *On Lee v. United States*, 343 U. S. 747 at 754, that eavesdrop evidence may be excludable where "an agent * * * violated any federal law", the evidence herein having been obtained by a Government officer (Keyser) who the defense alleged had just attempted in this very same matter to commit extortion—a violation of 18 U.S.C. § 872 and to solicit a bribe—a violation of 18 U.S.C. § 202.

Finally, until the trial, the Government's eavesdrop activities in this case were sheltered by the Treasury Inspectors and the Prosecutor even from official scrutiny. It is not disputed that the Grand Jury was told nothing about the eavesdrops (D116a-117a, D315-316a, D368a, D416a). The Inspectors' official reports employed the euphemism of "confidential informants" instead of mentioning the eavesdrops (e.g., D312a-315a, D362a). Inevitably thereby the Grand Jury was misled into thinking that the Government had reliable witnesses, and not only Keyser and Gillis.

The Grand Jury heard both Keyser and Gillis, but since we have not been favored with Gillis' Grand Jury testimony in this record, all judicial inquiry has been blocked off as to how the Government went about reconciling for the Grand Jury Keyser's imputations concerning Gillis with Gillis' own Grand Jury testimony and with the suspicious picture as to the framing of petitioner. Was the Government's choice not to call Gillis at the trial dictated precisely by its fear of opening up this hornets' nest in the Grand Jury testimony?

The Court of Appeals said (Appendix, *infra*, p. 9a) that "Under the circumstances here, where the evidence left Gillis' part in the affair obscure, it might have been desirable for the Court to call him". Later in its opinion, the Court of Appeals said that as to the Keyser-Gillis recording (Appendix, *infra*, p. 10a), "Since so small a part of the conversation was intelligible from the recording, and its meaning not clear, it was not error to keep it from the jury. If it be considered error, it appears harmless in the circumstances". In view of *Bollenbach* v. *United States*, 326 U. S. 607, 615-616 and *Kotteakos* v. *United States*, 328 U. S. 750, 762-766, the finding of "harmless error" in this case calls for corrective action by this Court, especially since the Court of Appeals' own further description of the Keyser-Gillis recording raises obvious suspicions concerning those two Agents (Appendix, *infra*, p. 10a).

(Question Presented, 11)

4. A vital part of the substantive theory of the defense related to the issues in the Van Berg tax matter. The trial court admitted extensive proofs concerning the merits of that tax case, and concerning the conferences had by Keyser

with the petitioner and others on the subject (*e.g.*, D35a-37a, D40a, D55a-56a, D68a, D79a, D137a-146a, D160a-163a, D189a-191a, D199a-201a, D204a-209a, D217a-218a, D222a, D241a-245a, D252a-255a, D262a, D443a-459a, D468-470a, D484a-486a, D471a-475a, D495a-496a, D538a-540a, D551a-556a, D566a-568a; and see Exh. F, in ev. D189a-191a).

There was thus substantial evidence from which the jury could conclude that Keyser's tax audits were by no means necessarily regarded by the Van Bergs or by petitioner as a catastrophic visitation. This in turn would naturally justify the jury in inferring that petitioner did not have any compelling incentive to try to bribe Keyser.

This crucial evidence, which was so immediately relevant, then, to the issues of motive and intent, was completely wiped out of the case by the court *via* an instruction to which the court lent special emphasis by the prefatory words "most important of all" (D593a).

All proof bearing on intent was of acute importance in this case because of the bitterly contested nature of the factual issues relating to the suspicious conduct of Keyser. It was vital that every circumstance in the case pointing to the lack of any "need" for a bribe be laid before the jury.

The decisions under the federal bribery statutes generally support our contention that the evidence of the merits of the tax audits was relevant for jury consideration on the issue of intent. *Neely* v. *United States*, 274 F. 2d 389, 392 (C.A. 9, 1960); *Bedell* v. *United States*, 78 F. 2d 358, 364 (C.C.A. 8, 1935), certiorari denied 296 U. S. 628; *Woelfel* v. *United States*, 237 F. 2d 484, 488 (C.A. 4, 1956).

The Court of Appeals perfunctorily rejected our above contentions (Appendix, *infra*, p. 14a).

(Question Presented, 12)

5. Eleven witnesses of the highest type testified to the petitioner's reputation as being of the "finest", "excellent", "of the highest", etc. (D428a).

In a case of this type, where word against word had to be decided by the jury, reliance on testimony of reputation witnesses became vital for the defendant. But, in the charge to the jury, without a shred of fact to base it on, the court undertook to destroy the effect of the testimony by gratuitously saying,

> "it may be that those with whom he had come into contact with [sic] previously have been misled and he did not reveal to them his true character" (D601a—exception at D604a).

The Court of Appeals approved this instruction (Appendix, *infra*, pp. 13a-14a) on the ground that the charge as a whole "properly places the evidence of good character before the jury to be weighed with all other evidence in the case . . . * * * ". Thus, the Court of Appeals did not venture to give unqualified approval to the above quoted instruction. Moreover, as is evident from the language of the Court of Appeals just quoted, and since this case presents in an exceptionally clear way the practical importance of the difference between the rule of the Second Circuit (e.g., *United States* v. *Kimmel*, 274 F. 2d 54, 57 (C.A. 2, 1960) and the rule of the Seventh and Tenth Circuits (see full discussion in *Peterson* v. *United States*, 268 F. 2d 87, 88-89 (C.A. 10, 1959) on the effect of character evidence as raising a reasonable doubt, this petition for certiorari brings forward the question of conflict in Circuits on this point. Taken as a whole, the charge on character evidence in this case is irreconcilable with fair standards of criminal trial.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue in this case. The decision below should not be permitted to stand as a guide for future federal criminal trials.

Respectfully submitted,

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with him on the petition.

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 39—September Term, 1961.
(Argued September 27, 1961 Decided November 13, 1961.)
Docket No. 26965

UNITED STATES OF AMERICA,

Appellee,

—v.—

ABRAHAM KABOT,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
and FRIENDLY and SMITH, *Circuit Judges.*

From a sentence of imprisonment for eighteen months, concurrent on two counts, imposed in the United States District Court for the Southern District of New York, Murphy, *J.*, on a jury verdict of guilty on charges of offering and giving money to an employee of the Internal Revenue Service with intent to influence his decision on income taxes due and owing, in violation of Title 18, United States Code, Section 201, defendant appeals. Affirmed.

HENRY G. SINGER, Brooklyn, New York (Maurice Edelbaum, New York, N. Y., on the brief), *for defendant-appellant.*

EDWARD R. CUNNIFFE, Asst. U. S. Attorney, So. District of New York, New York City (Robert M. Morgenthau, U. S. Attorney, and Arnold M. Enker, Asst. U. S. Attorney, So. District of New York, on the brief), *for appellee.*

SMITH, *Circuit Judge:*

This is an appeal from concurrent eighteen month sentences for offering and giving a $25,000 bribe to one Keyser, an Internal Revenue Agent to influence him in an income tax matter. 18 United States Code, Section 201. The judgment is affirmed.

Appellant attacks the conviction on numerous grounds, including the denial of a pre-trial motion to dismiss the indictment for unnecessary delay in filing, the failure to call Gillis, an Internal Revenue Agent, as a witness, refusal to produce statements and grand jury testimony of Gillis and one Sweeney, an investigating agent who died during the trial, the admission in evidence of recordings of Kabot's conversations with Keyser, the exclusion of a recording of a conversation between Keyser and Gillis, instructions to the jury on character evidence and on evidence relating to the merits of the tax case, and refusal of instructions on a theory of enticement. We find no reversible error.

Appellant Abraham Kabot was accountant for Salomon and Bart van Berg, diamond merchants, and their wives and for two New York corporations which they controlled, Van Berg Diamonds, Inc. and Rough Diamond Co., Inc., as well as for other clients, many of whom were also in

the diamond business. One Keyser was an agent of the Internal Revenue Service in the International Operations Division, stationed in Washington, D. C. An agent of the Service in Puerto Rico reported that there was a question concerning the withdrawal by Salomon van Berg from a Puerto Rican van Berg corporation, Brilliants, Inc. of $2,000,000 and of allocation of profits and expenses between Brilliants, Inc., and Van Berg Diamonds, Inc., to which Brilliants sold virtually all its output. Keyser was thereupon in July 1958 assigned to audit the individual returns of the van Bergs for 1954 through 1957, the corporate returns of Van Berg Diamonds for the same years, and the corporate returns of Rough Diamonds, Inc. for the fiscal years 1955, 1956 and 1957. Keyser telephoned Salomon Van Berg for an appointment. Van Berg had Kabot call Keyser back and an appointment was made for September 8. On that date Keyser came to New York, called on Kabot at Kabot's office and explained the two major questions pending. He then went with Kabot to van Berg's office and explained the issues to van Berg.

Keyser on the 8th mentioned to Kabot that he had an acquaintance with one Gillis, an agent in the New York Internal Revenue office. On or about the 9th of September Keyser mentioned to Gillis' superior that he was acquainted with Gillis, who was called in to greet Keyser. Keyser was at van Berg's office conducting the audit on September 9 and 10, returning to Washington September 12. Keyser had arranged to come back to New York September 29. Someone representing himself as Keyser's superior, Moysey, called Kabot and told him rather abruptly that there was too long a delay. The appointment was moved up to

September 25. In the latter part of September and in October Keyser was at the van Berg office about a dozen times. At about this time, according to Kabot, Gillis stopped in at Kabot's office and told Kabot that Keyser wanted him to know that he was a pretty good agent and could get very rough. On being asked how Keyser would like it if the conversation were reported, Gillis was said to have asked Kabot to forget about it; and to have pleaded with Kabot not to say anything to Keyser. Sometime after Gillis had talked with Kabot, Keyser called Gillis and had dinner at Gillis' house. Keyser testified that there was no mention of the case at Gillis' house. On October 27 Gillis was invited to and did accompany Keyser and Kabot to lunch.

About October 9 Keyser had told Kabot and van Berg that he was going to recommend that the $2,000,000 withdrawal be taxed as a dividend to van Berg and that he would work up a figure on the reallocation of profits and expenses between the Puerto Rican and New York corporations. He also mentioned another questioned item of a $300,000 credit on the books of Van Berg Diamonds. Keyser returned to Washington, coming back to New York on October 27. He informed Kabot that he was recommending that the $2,000,000 withdrawal and $300,000 credit be taxed as dividends resulting in an added individual tax of $1,929,000, and that the corporate tax be increased $460,000 as a result of reallocation of profits and expenses. Kabot asked if the case could be disposed of at Keyser's level. Later, walking back after a visit to van Berg's office, according to Keyser, Kabot said that he apologized for bringing the matter up, but that Gillis said it would be

all right to ask if there was anything he could do to make everybody happy and dispose of the case without carrying it to a higher level.

On considering the conversation overnight, on October 28 Keyser decided that Kabot was referring to a bribe, and so informed his Washington office. He was instructed not to lead Kabot on, but that if he was offered a bribe he was to pretend to go along with the scheme. Investigating agents then placed a concealed Minifon recording device on Keyser's person, turning it on before he went in to Kabot's office on October 28. Keyser and Kabot talked about the case at some length, for more than an hour. A recording of the conversation was in evidence at the trial and was played for the jury. Kabot was shown Keyser's work sheets. According to Keyser, after considerable discussion of the issues Kabot told Keyser that if he would cooperate he would speak to the van Bergs and maybe make it worth while. The recording reflects mention by Kabot of the van Bergs making it worth while. Later, dropping his voice so that it is inaudible on the recording Kabot told Keyser, according to Keyser's version, that if he could put this through without a dividend and just with some reasonable allocation of expenses he thought he could "get around 25 grand." The recording, after the voices again became audible, bears out Keyser's testimony that Keyser mentioned that he had a family to think of, that there was a risk. Kabot told him not to worry, the risk was his too, they could work it out, to think it over. Keyser said he would. Kabot then said he would get up some figures Keyser could use in his report

On October 29 or 30 according to Kabot, Gillis reappeared at Kabot's office and told Kabot that Keyser had informed Gillis that Kabot and Keyser had come to a settlement of the case, to which Kabot replied that Keyser had not exactly indicated to Kabot that it was settled, but that he, Kabot, hoped so.

On October 30 Keyser, with a concealed Minifon, took Gillis out for coffee. The recording of this conversation was made available to the defense but excluded from evidence. This episode is discussed below.

Sometime prior to November 13 Kabot telephoned Keyser, told him the figures were ready and arranged to meet November 13. Keyser, again with a concealed Minifon, went to Kabot's office. The recording was later accidentally spoiled. Keyser's version, denied by Kabot, is as follows: Kabot asked whether Keyser had given any thought to their previous conversation. Keyser, on instructions from his superiors, stated that he had returned because Kabot had promised $25,000 if Keyser would revise the reports. Keyser instructed Kabot to tell the van Bergs he could make it about $25,000 additional tax for each of the three years. Keyser then returned to his hotel. Kabot later came to Keyser's room, and in a conversation recorded by agents in the next room over microphones and wires planted in Keyser's room, asked the procedures to be used in submitting Keyser's reports. Kabot then said to give him a couple of days to make the necessary arrangements.

On November 17 Keyser telephoned Kabot and arranged to meet November 19. On the morning of the 19th he went to Kabot's office with a concealed Minifon. The recording's

audibility is in dispute. According to Keyser he showed Kabot his proposed reports and agreed to a further downward revision, telling Kabot it was based on Kabot's statement that he would get Keyser $25,000. Kabot is claimed by Keyser to have instructed Keyser to go back to the hotel and revise the reports. According to Keyser, Kabot explained that then both would get in a taxi and leave Kabot's office, that Kabot would have the money and give it to Keyser while in the cab, and that Kabot would then leave the cab and Keyser could go on. After lunch together, Keyser returned to Kabot's office for his briefcase, then went back to the hotel to revise the report.

At 3:00 p.m. Keyser was searched by the agents, a concealed Minifon placed on him and put in operation, and he returned to Kabot's office. He showed Kabot some forms and gave him others. In front of Kabot's office the two took a cab. According to Keyser, while riding in the cab, Kabot opened a briefcase and took therefrom a white manila envelope tied with string, which he gave to Keyser. The cab stopped, Kabot got out, and on a signal from Keyser was arrested by agents who had them under surveillance. They also pretended to arrest Keyser. The white envelope had inside it another envelope containing $25,000 in currency. Kabot denied any knowledge of the envelope or money.

Kabot was arraigned before a United States Commissioner November 19, 1958 upon a complaint charging him with violation of 18 U. S. C. §201 and held to answer in $10,000 bail, which he furnished. The Commissioner's hearing was adjourned about 20 times without opposition from

Kabot. Meantime, extensive investigation was carried on to determine if others were involved. Evidence was presented to the January 1960 Grand Jury, which returned an indictment of Kabot on March 8, 1960. Kabot was arraigned on the indictment March 25, 1960, stood mute, a plea of not guilty was entered by direction of the court, and bond was continued in the same amount. On April 14, 1960 appellant filed motions to dismiss, for bill of particulars and for inspection of documents. May 26, 1960 appellant's counsel requested trial adjournment to the first week in October 1960. On June 28, 1960 the motion to dismiss the indetment was denied, and the motions for bill of particulars and for inspection were denied in part and granted in part. On December 28, 1960, new counsel for appellant filed an affidavit requesting an adjournment of trial. On March 8, 1961 trial was begun. Trial was concluded on March 24, 1961, the jury finding Kabot guilty on both counts.

Appellant cannot complain of the 16 month period between his arrest November 19, 1958 and his indictment March 8, 1960, or the one year period between indictment and the date of trial, March 8, 1961. He did not waive preliminary hearing. He acquiesced in repeated adjournments for the purpose of further investigation by the government of possible involvement of others and possible mitigating circumstances surrounding his own actions. He did not move before the Commissioner for prompt hearing. After indictment his counsel twice requested adjournment of trial dates. Delay caused by or consented to by a defendant is not unreasonable. The right to a

speedy trial is deemed waived if not promptly asserted. *United States* v. *Lustman*, 258 F. 2d 466, 478 (2 Cir. 1958), cert. denied 358 U. S. 880 (1958). There is, moreover, no showing of prejudice to appellant from the delay. The one witness, Sweeney, who died during the course of the trial had been available when appellant had requested adjournments of the trial date. There is no indicaton that his testimony would in any way have aided appellant.

The prosecution was under no obligation to call Gillis as a witness. It made known to the defense that Gillis was available and that it did not intend to call him. Under the circumstances it was for the defense to call him or not as it chose. *Cenedella* v. *United States*, 224 F. 2d 778 (1 Cir. 1955), cert. denied 350 U. S. 901. Under the circumstances here, where the evidence presented left Gillis' part in the affair obscure, it might have been desirable for the court to call him. Compare *United States* v. *Lutwak*, 195 F. 2d 748 (7 Cir. 1952), aff. *Lutwak* v. *United States*, 344 U. S. 604. Since he was available and could have been called by the defense, however, it was within the discretion of the court not to call him as a court's witness. *United States* v. *D'Ercole*, 225 F. 2d 611 (2 Cir. 1955); *United States* v. *Paccione*, 224 F. 2d 801 (2 Cir. 1955), cert. denied 350 U. S. 896.

Since neither Gillis nor Sweeney testified, the defense was clearly not entitled to inspection of their grand jury testimony, or to statements and reports they made to the investigators. *Jencks* v. *United States*, 353 U. S. 657 (1959), 18 U. S. C. §3500(a). "This section [subsection (a)] manifests the general statutory aim to restrict the use of such

statements to impeachment." *Palermo* v. *United States* (1959), 360 U. S. 343, 349, rehearing den. 361 U. S. 855.

The grounds upon which the Keyser-Gillis recording was sought are unclear on the record. Nevertheless the recording might have been allowed in evidence. Gillis did not testify. Keyser did, and was cross examined as to his conversation with Gillis on the basis of his memoranda of October 30 and December 1, 1958,, Defendant's Exhibits B and A, which the court had admitted in evidence. So far as the recording was intelligible, therefore, it might properly have been admitted. This court has listened to the recording. The recording was, however, largely unintelligible due to background noises. It does appear that Keyser asked Gillis for some advice and mentioned that he thought Kabot might have something in mind, and that Gillis replied that was very possible. Nothing else was sufficiently audible to determine exactly what Gillis meant or whether Gillis was talking about Kabot or his experience with accountants in general. There appeared to be nothing in the meager amount of intelligible conversation at all inconsistent with Exhibit B, which was in evidence and used by appellant's counsel in cross examination of Keyser. Since so small a part of the conversation was intelligible from the recording, and its meaning not clear, it was not error to keep it from the jury. If it be considered error, it appears harmless in the circumstances.

The other recordings, which were admitted in evidence, of conversations between Keyser and Kabot, were important to the government's case, supporting as they did in detail much of Keyser's testimony concerning the offer of the bribe, and the lack of solicitation by Keyser of any

offer in the conversations up to that point. The appellant contends that the making and use of the recordings were an unconstitutional search and seizure and a violation of defendant's right to due process of law. Appellant's contention is not valid. Clearly the Supreme Court has held, although over vigorous dissent, that neither the constitutional protection against unreasonable searches and seizures nor the Communications Act prevent the use of recordings of conversations between government agents and persons suspected of criminal activity, absent any trespass or unauthorized tapping of telephone or telegraph wires. *On Lee* v. *United States*, 343 U. S. 747 (1952). See *The Problem of Electronic Eavesdropping* (1961), Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. Neither the planting of the microphones in Keyser's hotel room with his consent, and their use by the agents in the next room, nor the Minifons carried by Keyser amounted to trespass within the definition of the majority in *On Lee*, or approach the psysical invasion of another's dwelling without consent perpetrated with the spike mike whose fruits were excluded in *Silverman* v. *United States*, 365 U. S. 505 (1961). The recordings were properly admitted in evidence.

Defendant also contends that the charge was erroneous in telling the jury that there was no issue in the case about enticement, inducement or entrapment. We find it unnecessary to consider the government's argument that the defense, being inconsistent with a denial of all criminal activity, is not available to one relying on such a denial. This question need not be reached because of the absence

of sufficient evidence to raise a question of entrapment for the jury; to have charged on entrapment would only have created undesirable confusion.

The only testimony in the case as to the origin of the idea of the offer of October 28 is that of Keyser and Kabot. Keyser's testimony puts the first tentative suggestion in Kabot's statement during the walk on October 27, a statement Kabot explains as an innocent reference to clearing up the case in a normal manner at the agent's level. Whichever version the jury believed, there was no suggestion that the idea of bribery was initiated by Keyser. The only evidence from which any inference of suggestion of a crime could conceivably be drawn would be the equivocal statements of Gillis as reported by Kabot. These seem to us insufficient to base any inference of government effort to incite Kabot to crime. The inferences which may be drawn from the claimed conduct of Gillis in relation to Keyser amount at most to an attempt at extortion from Kabot or van Berg. If the jury were to find that such a crime was in the minds of Gillis or of Gillis and Keyser it would be no defense to Kabot. Entrapment involves the action of over-zealous government agents acting for the government inciting an innocent man to crime. Extortion on the other hand is based on conduct by dishonest employees attempting action against the government.

The actions of Keyser and the investigating agents after the bribe offer of October 28 was made, were legitimate efforts to apprehend one already embarked on a course of criminal conduct. There is no evidence either from the testimony of the agents or of defense witnesses that after

Kabot's apparent suggestion of the bribe was reported by Keyser on October 28 and Keyser was acting under instructions, any pressure was exerted by the government to make Kabot go through with the offer or payment. No suggestion of any kind was made by Keyser, on any version of the evidence, until the actual offer of October 28, and thereafter, while Keyser referred at times to the amount promised, there is nowhere evidence of a desire of Kabot to withdraw from the scheme or of efforts of Keyser to hold him to the proposition against Kabot's wishes. There is here no evidence of entrapment. *Lansford* v. *United States*, 200 F. 2d 237 (10 Cir. 1952), *Marks* v. *United States*, 260 F. 2d 377 (10 Cir. 1958), cert. denied 358 U. S. 929, *United States* v. *DeMarie*, 226 F. 2d 783 (7 Cir. 1955), *Sabbatino* v. *United States*, 298 Fed. 409 (2 Cir. 1924), cert. denied 266 U. S. 602 (1924). "• • • the fact that officers or employees of the Government merely afford opportunity or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises." *Sorrells* v. *United States*, 287 U. S. 435, 441 (1932). Lacking sufficient evidence of entrapment, denial of the requested instruction was not error. *United States* v. *DiDonna*, 276 F. 2d 956 (2 Cir. 1960).

Appellant attacks the charge on character evidence, specifically the following portion thereof: "It may be that those with whom he had come in contact with (sic) previously had been misled and he did not reveal to them his true character." This portion may not be considered

alone, however. Taken as a whole,[1] the charge properly places the evidence of good character before the jury to be weighed with all other evidence in the case in determining the guilt or innocence of the defendant. *United States v. Crosby*, —— F. 2d —— (2 Cir. 1961), slip op. 2681, 2717.

Finally, objection is made to the instruction to the jury to disregard the question of the merits of the tax case. This instruction was entirely proper in light of the need for guiding the jury through a mass of complex testimony. Considering the charge as a whole, there was nothing in it tending to make the jury believe that it could not consider the existence of the tax claim and Kabot's ideas about its seriousness with reference to the issue of Kabot's motivation. There was no request for an affirmative instruction on this point, and no attack is here made on its absence.

The charge warning against religious prejudice was not requested by appellant and might better have been left out. It apparently was given in an excess of caution because of mention of religious holidays in the testimony. We cannot say that it was prejudicial.

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[1] "Now, there has been testimony here to the previous good character of the defendant. You should consider such evidence of character together with all the other facts and all the other evidence in the case in determining the guilt or innocence of the defendant. Evidence of good character may in itself create a reasonable doubt where without such evidence no reasonable doubt would have existed. But if on all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty, a showing that he had previously enjoyed a reputation of good character, does not justify or excuse the offense and you should not acquit a defendant merely because you believe he is a person of good repute. It may be that those with whom he had come into contact with previously have been misled and he did not reveal to them his true character."

The charge emphasized the question before the jury of where the $25,000 in evidence came from. It was a central issue in the case and it was not error to call it to the jury's attention in the charge. We find no reversible error in the charge

No other issues appear to merit discussion.

The judgment of conviction is affirmed on both counts.

LUMBARD, *Chief Judge* (concurring):

I concur with everything Judge Smith says with the exception of his statement that it might have been desirable for the court to have called Gillis as a witness with reference to his obscure part in the case. It seems to me the trial judge exercised good judgment in not following this will-o'-the-wisp and thus emphasizing an extraneous matter which neither party saw fit to explore further or to clarify. The issue was Kabot's guilt; it was not whether Gillis might have been engaging in some questionable activity. The only possible relevance of Gillis' testimony would have been on some theory of extortion, but extortion was never claimed by Kabot and it was never in the case. The trial judge used good judgment in leaving matters as they were, especially as the defense never even requested such action during the trial.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of November one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ABRAHAM KABOT,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Constitutional Amendment and Statutes Involved

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Unreasonable searches and seizures.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

TITLE 18, U.S.C. § 201. *Offer to officer or other person*

Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

This section shall not apply to violations of § 212 of this title.

Appendix—Constitutional Amendment and Statutes Involved

TITLE 18, U.S.C. § 202. *Acceptance or solicitation by officer or other person*

Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or any officer or person acting for or on behalf of either House of Congress, or any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States.

This section shall not apply to violations of section 213 of this title.

TITLE 18, U.S.C. § 782. *Extortion by officers or employees of the United States*

Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined not more than $5,000 or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed $100, he shall be fined not more than $500 or imprisoned not more than one year, or both. As amended Oct. 31, 1951, c. 655 § 24(b), 65 Stat. 720.

Order on Rehearing

UNITED STATES DISTRICT COURT

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v.—

ABRAHAM KABOT,

Appellant.

PETITION FOR REHEARING

Henry G. Singer, Brooklyn, N. Y.,
for appellant.

The petition for rehearing is denied.

J. E. L.
H. J. F.
J. J. S.
U.S.C.JJ.

28 November 1961